

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DANTE B. MAGDALUYO, JR.,

Plaintiff,

v.

MGM GRAND HOTEL, LLC,

Defendant.

Case No. 2:14-cv-01806-APG-GWF

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

(ECF No. 121)

**ORDER DENYING PLAINTIFF'S
APPEAL OF ORDER ON MOTION TO
COMPEL**

(ECF No. 127)

**ORDER GRANTING DEFENDANT'S
MOTIONS TO STRIKE**

(ECF Nos. 145, 147, 155)

Plaintiff Dante Magdaluyo's Second Amended Complaint alleges that defendant MGM Grand Hotel, LLC (MGM) has directed its employees to engage in an extended campaign of harassment against him. Magdaluyo brings claims for discrimination and retaliation under Title VII, invasion of privacy, defamation, workplace violence, and intentional infliction of emotional distress (IIED).

MGM moves for summary judgment on the bases that Magdaluyo's evidence is untrustworthy and entirely uncorroborated by other evidence in the record. MGM also makes specific arguments on each claim as to how Magdaluyo fails to meet a required element or offer alleged conduct that falls within the applicable statutes of limitations.

I grant MGM's motion for summary judgment on the Title VII, defamation, workplace violence, and IIED claims. For these claims, even viewing the evidence in the light most favorable to Magdaluyo, he fails to state a claim. I deny MGM's motion for summary judgment

1 as to the claim for invasion of privacy because I cannot determine as a matter of law that MGM
2 did not allow or encourage employees to search Magdaluyo's backpack or that such searches
3 would not be highly offensive to a reasonable person.

4 I deny Magdaluyo's appeal (ECF No. 127) of Magistrate Judge Foley's order on
5 Magdaluyo's motion to compel (ECF No. 125). I agree with the judge that Magdaluyo's request
6 for a detailed schematic of the entire casino's video surveillance system is overbroad and
7 irrelevant, especially to his surviving claim. MGM has produced discovery with respect to its
8 video retention policy, which is relevant.

9 I also grant MGM's request to strike Magdaluyo's "objections" and "motions to strike"
10 (ECF Nos. 144–147), as they are inappropriate attempts to evade the page limit for argument,
11 rather than true evidentiary objections.

12 **I. BACKGROUND**

13 Magdaluyo has worked at MGM as a dealer since 1993. He alleges that in 1996 an
14 incident occurred at a baccarat tournament where a valuable chip went missing and MGM
15 management suspected him of theft. ECF No. 21 at 4. While management never accused him
16 directly, Magdaluyo alleges that thereafter he was "continuously being watched very closely
17 from 1996–2013, then MGM employees started to search [his] bag in 2012–2014." *Id.* at 5.

18 Magdaluyo maintained journal entries of hundreds of incidents or interactions that he
19 believes demonstrate a conspiracy by MGM and its employees to intimidate, ostracize, and
20 harass him. *See* ECF Nos. 138-1–138-14. The alleged incidents mostly involve employees "gang
21 staring," approaching Magdaluyo aggressively, whistling to annoy him, pretending to be scared
22 of him on camera, and the like.

23 A full list of alleged incidents would be repetitive, but the following are independently
24 germane to evaluating Magdaluyo's claims:

- 25 • In 2008, supervisor Phil Rosen told Magdaluyo that he "hates Filipinos and that the
26 United States should invade the Philippines." ECF No. 21 at 8.
- 27 • In 2009, Rosen pointed at Magdaluyo and told several coworkers, "This guy is a thief and
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1 a scam artist.” *Id.*

- 2 • On November 29, 2013, an MGM employee removed Magdaluyo’s personal backpack
- 3 from the employee break room and placed it outside the door. Magdaluyo believes she
- 4 moved it so that another employee could search it, and contends its contents were rifled
- 5 through when he found it. *Id.* at 5.
- 6 • Magdaluyo was attacked by coworkers twice while on the job, once in 2012 and once in
- 7 2013. In the first incident, a pit boss struck Magdaluyo in the head with his elbow; in the
- 8 second, a floor supervisor punched him in his shoulder. *Id.* at 13–14.

9 Magdaluyo repeatedly complained to MGM Human Resources about the harassment. The
 10 first recorded complaint took place in 2001; complaints resumed in 2010 and occurred fairly
 11 frequently thereafter. *See* ECF No. 142 at 18. He also lodged an EEOC complaint in 2014. ECF
 12 No. 21 at 25. MGM disputes that it has accused Magdaluyo of stealing, searched him or his
 13 effects, or directed employees to harass or ostracize him. *See* ECF No. 121.

14 II. ANALYSIS

15 Summary judgment shall be granted when “there is no genuine dispute as to any material
 16 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The
 17 moving party “has the initial burden of showing the absence of a genuine issue of material fact.”
 18 *Pioneer Chlor Alkali Co., Inc. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, 863 F. Supp. 1237,
 19 1239 (D. Nev. 1994) (citations omitted). “A material issue of fact is one that affects the outcome
 20 of the litigation and requires a trial to resolve the differing version of events.” *Id.* (citations
 21 omitted). Once the moving party satisfies its initial burden, the burden shifts to the non-moving
 22 party to set forth specific facts showing that there is a genuine issue for trial. *Id.* (citations
 23 omitted). The non-moving party “may not rely on denials in the pleadings but must produce
 24 specific evidence, through affidavits or admissible discovery material, to show that the dispute
 25 exists.” *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991).

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1 **A. Title VII Claims**

2 Read permissively, Magdaluyo offers three theories to support his Title VII claim. First,
3 he contends he was subjected to a hostile work environment based on his national origin. He
4 then claims that when he engaged in protected activity to address that harassment, he was
5 subjected to adverse employment action(s) and further harassed in retaliation.

6 *1. National Origin Harassment*

7 Magdaluyo claims that he was subjected to a hostile work environment because he is
8 Filipino, which is a protected characteristic under Title VII. To prevail, he must show that the
9 harassment was actually due to the protected characteristic. *See, e.g., Kang v. U. Lim Am., Inc.*,
10 296 F.3d 810, 817 (9th Cir. 2002). Magdaluyo claims harassment for over a decade due to his
11 national origin, but the only evidence that connects the alleged harassment with his heritage is
12 the alleged comment by a direct supervisor in 2008 stating “I hate Filipinos and the U.S. should
13 invade the Philippines.” ECF No. 21 at ¶ 22. This statement, even if credited, does not establish
14 an overarching racial animus against Filipinos at MGM that could explain an alleged conspiracy
15 of harassment involving 30 to 50 employees over more than ten years. Courts have held that
16 “‘stray’ remarks are insufficient to establish discrimination.” *Merrick v. Farmers Ins. Grp.*, 892
17 F.2d 1434, 1438 (9th Cir. 1990).

18 *2. Retaliatory Adverse Employment Action*

19 To establish retaliation, Magdaluyo must show that “(1) he engaged in a protected
20 activity, (2) he suffered an adverse employment action, and (3) a causal connection exists
21 between the two events.” *See Passantino v. Johnson and Johnson Consumer Prods., Inc.*, 212
22 F.3d 493, 506 (9th Cir. 2000). Magdaluyo engaged in protected activity with his repeated
23 complaints to MGM’s human resources department, as well as his 2014 EEOC complaint.
24 Magdaluyo could be understood to make a Title VII claim that he suffered an adverse
25 employment action in retaliation for protected activity based on his exclusion from the dealers’
26 Toke Committee. He claims that in 2011 the leader of the Toke Committee replaced Magdaluyo
27 with one of the leader’s Caucasian friends. ECF No. 21 at ¶ 89. This claim is, however, time-
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1 barred as it was brought in 2014 and thus not within 300 days of the alleged adverse action. 42
2 U.S.C. § 2000e-5(c).

3 *3. Retaliatory Harassment*

4 Rather than complain about typical adverse employment actions, Magdaluyo's primary
5 complaint is that MGM directed its employees to harass him, creating a hostile work
6 environment. Retaliatory harassment claims require the same showing as complaints about an
7 adverse employment action, except instead of an adverse action the complainant must show that
8 he was subjected to harassment "sufficiently severe or pervasive to alter the conditions of [his]
9 employment and create an abusive working environment. . . . The working environment must
10 both subjectively and objectively be perceived as abusive." *Brooks v. City of San Mateo*, 229
11 F.3d 917, 923 (9th Cir. 2000) (citations omitted). Unlike his adverse employment action claim,
12 some of the alleged harassment took place within the Title VII statute of limitations period. *See*,
13 *e.g.*, ECF No. 138-1 at 74–75 (describing alleged improper bag search in November 2013).

14 The overwhelming majority of the conduct that Magdaluyo complains of, and that he
15 documents extensively, is not actionable under Title VII. *See Oncale v. Sundowner Offshore*
16 *Svcs., Inc.*, 523 U.S. 75 (1998) (explaining that Title VII is not a general civility code). This
17 includes his allegations of staring, whistling, generic banter, and the like. Even if some of the
18 alleged conduct rises to the level of creating an abusive workplace under Title VII, Magdaluyo
19 has failed to demonstrate the connection between his protected activity and the alleged
20 harassment. Title VII plaintiffs are required to affirmatively establish, by use of specific
21 evidence, a but-for connection between protected activity and resultant harassment. *Univ. of*
22 *Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525 (2013). The closest Magdaluyo comes to
23 such an attempt is the following statement and similar ones: "Mr. Magdaluyo perceives the
24 discipline as entrapment and retaliation," and "[i]f not for the lawsuit, [he] would not have been
25 disciplined." ECF No. 142 at 27. Such speculation is insufficiently specific to carry
26 Magdaluyo's burden under *Nassar*, so his Title VII claim fails.

27 I therefore grant MGM's motion for summary judgment as to all Title VII claims.
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1 **B. Invasion of Privacy**

2 Magdaluyo claims MGM has invaded his privacy in two ways. First, he claims MGM
3 repeatedly directed employees to clandestinely search his backpack, which was an “unreasonable
4 intrusion into another’s seclusion or personal life.” ECF No. 142 at 34. He also claims that
5 MGM has caused “public disclosure of private facts” by circulating rumors about him among his
6 coworkers. *Id.* at 35.

7 *1. Intrusion Upon Seclusion*

8 To recover for the tort of intrusion, a plaintiff must establish: “(1) an intentional intrusion
9 (physical or otherwise); (2) on the solitude or seclusion of another; (3) that would be highly
10 offensive to a reasonable person.” *Kuhn v. Account Control Tech.*, 865 F. Supp. 1443, 1448 (D.
11 Nev. 1994) (citing Restatement (Second) of Torts § 652B)). “The question of what kinds of
12 conduct will be regarded as a ‘highly offensive’ intrusion is largely a matter of social
13 conventions and expectations,” and is therefore a matter usually to be resolved by a jury. *See id.*
14 at 1449.

15 In this case, genuine issues of material fact remain as to the alleged backpack searches.
16 Magdaluyo states that on several occasions he found his backpack moved, with the contents
17 rifled through. ECF No. 21 at 10, 12–13; ECF No. 138-1 at 69, 74–75, 86, 95, 132. Surveillance
18 footage of the dealer quiet room from November 28, 2013 shows an employee moving
19 Magdaluyo’s bag and setting it outside the door, beyond view of the camera. *See* ECF No. 236.
20 MGM failed to preserve video of the area where the bag was placed despite being timely put on
21 notice by Magdaluyo. Magistrate Judge Foley therefore held that “[t]he jury should be instructed
22 that the video recording of the incident on November 28, 2013, if produced, would be favorable
23 to [Magdaluyo’s] allegation that someone searched his backpack.” ECF No. 95. MGM contested
24 that instruction by “disput[ing] that the camera in the main dealer’s room would have shown
25 whether anyone searched [Magdaluyo’s] backpack, because a large column blocks from the view
26 of that camera the dealer’s quiet room entrance.” ECF No. 99 at 2. As an initial matter, MGM
27 offered no proof to support that claim at the time, nor does it offer any now. In addition, even if
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1 the door itself was blocked from view, video from the main room could have shown if the
2 backpack was further moved, and who moved it.

3 MGM also argues that even if one or more employees searched Magdaluyo's bag on
4 multiple occasions, "there is no evidence to impute liability to MGM." ECF No. 154 at 19.
5 Magdaluyo, however, offers extensive statements detailing incidents that suggest MGM
6 supervisors suspected that he had stolen or is stealing from the casino. A jury could infer from
7 this that any backpack searches were at the behest of, or at least with the acquiescence of, MGM.
8 MGM insists that Magdaluyo's evidence consists only of "self-serving notes, complaints, and
9 declarations" that are contradicted by the testimony of all MGM employees. ECF No. 121 at 2.
10 But this is a credibility issue for the jury to decide. Magdaluyo's affidavits are not "conclusory"
11 or bereft of detail—on the contrary, they are incredibly detailed and extensive. MGM's
12 contention that Magdaluyo is imagining or contorting the events he describes raises genuine
13 issues of material fact and witness credibility. Summary judgment is therefore inappropriate on
14 Magdaluyo's claim for intrusion upon seclusion arising from the alleged searches of his
15 backpack.

16 *2. Public Disclosure of Private Facts*

17 A claim for public disclosure of private facts under Nevada law requires proof that
18 private facts were publicly disclosed and that disclosure was offensive and objectionable to a
19 reasonable person of ordinary sensibilities. *Kuhn*, 865 F. Supp. at 1449. "Public disclosure"
20 means "that the matter is made public, by communicating it to the public at large, or to so many
21 persons that the matter must be regarded as substantially certain to become one of public
22 knowledge." *Id.* (citing Restatement (Second) of Torts § 652D cmt. a (1977)). Neither the
23 complaint nor Magdaluyo's response to MGM's motion contends that any rumors or private
24 facts were spread beyond his immediate coworkers. This does not constitute a disclosure to the
25 public at large, and thus Magdaluyo fails to state a claim under this theory of invasion of privacy.

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1 **C. Defamation**

2 Magdaluyo claims that MGM has defamed him through its employees' statements
3 characterizing him as a thief. ECF No. 21 at 31. MGM responds that Magdaluyo does not allege
4 specific defamatory statements falling within the two-year statute of limitations period for
5 defamation claims under Nevada law. Nev. Rev. Stat. § 11.190(4)(c). Thus, the only allegations
6 that may be considered are those that occurred on or after March 12, 2013.

7 The only specific statements of this nature I can find fall outside the limitations period.
8 *See, e.g.*, ECF No. 21 at ¶ 23 (claim that Magdaluyo's supervisor, Phil Rosen, told another
9 employee in 2009 that Magdaluyo was "a scam artist and a thief"); ECF No. 138-1 at 68 (claim
10 that supervisor Linda Pate joked, "I have to watch Klepto Dante over here"). Magdaluyo does
11 not offer evidence of statements made within the limitations period to support a defamation
12 claim. I therefore grant MGM's motion for summary judgment on the defamation claim.

13 **D. Workplace Violence**

14 In his complaint, Magdaluyo alleges two incidents of workplace violence for which he
15 seeks to hold MGM responsible: one in 2012 and one in January 2013. MGM responds that
16 because the complaint was filed in May 2015, neither is within the two-year statute of limitations
17 period. *See* Nev. Rev. Stat. § 11.190(4)(c). Rather than contest this, in his response to the motion
18 Magdaluyo adds five alleged assaults and batteries that fall within the limitations period. ECF
19 No. 142 at 43–45. MGM does not address these additional allegations in its reply.

20 Magdaluyo cannot rely upon incidents newly disclosed in his response to the motion.
21 But even if I interpret Magdaluyo's inclusion of the five additional incidents as a request to add a
22 supplemental pleading under Rule 15(d), none supports a claim for which MGM could be liable.
23 In the first incident, Magdaluyo describes a confrontation between himself and a fellow dealer,
24 Willis Nelson, who Magdaluyo believes has been directed by MGM to test Magdaluyo's
25 patience by serially whistling at him. Nelson reportedly "charg[ed] up to [Magdaluyo's] face
26 with the intention to head butt him . . . while intentionally spraying saliva on Magdaluyo's face."
27 ECF No. 142 at 43. But under Nevada law, MGM is not liable unless Magdaluyo proves: "(a)
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1 the employee's conduct was not an independent venture, (b) the employee's conduct was
 2 committed in the course of his or her assigned tasks, and (c) the employee's conduct was
 3 reasonably foreseeable in light of the nature and scope of his or her employment." *Vaughan v.*
 4 *Harrah's Las Vegas, Inc.*, 238 P.3d 863 (Nev. 2008) (citing Nev. Rev. Stat. § 41.745).
 5 Magdaluyo fails to explain how, even if MGM had directed Nelson to try Magdaluyo's patience
 6 by whistling, it was reasonably foreseeable that Nelson would commit an assault and battery
 7 against Magdaluyo.

8 The other four incidents are not assaults or batteries. Under Nevada law, a civil assault
 9 claim requires the plaintiff to show the actor "(1) intended to cause harmful or offensive physical
 10 contact, and (2) the victim was put in apprehension of such contact." *Burns v. Mayer*, 175 F.
 11 Supp. 2d 1259, 1269 (D. Nev. 2001) (citing Restatement (Second) of Torts, § 21 (1965)). For a
 12 battery claim, the second element is instead that "such contact did occur." *Id.* The incident
 13 Magdaluyo offers as Nelson's second assault and battery is preserved on video and available to
 14 the court. *See* ECF No. 248. The video does not show an assault or battery. Nelson and
 15 Magdaluyo appear to exchange words, stand face-to-face for about ten seconds but do not touch
 16 each other, and then the parties break and Nelson walks away. The Romanchik incident involves
 17 an MGM security guard who allegedly walked next to Magdaluyo, "brushing [Magdaluyo's] tux
 18 jacket with his body." ECF No. 138-1 at 147. A reasonable jury could not find that Romanchik
 19 intended or caused harmful or offensive contact. Guy Lambert, Magdaluyo's floor supervisor,
 20 allegedly "slapped his hands on Mr. Magdaluyo's shoulders from behind." ECF No. 142 at 45.
 21 Milorad Nikolic, a dealer, allegedly patted Magdaluyo's chest pocket. *Id.* In neither case does
 22 Magdaluyo explain how these actions demonstrate that the individuals intended to cause harmful
 23 or offensive physical contact, and no reasonable jury could so find. Any unusual offense taken
 24 by Magdaluyo cannot be ascribed backward onto either Lambert's or Nikolic's intent.

25 **E. Intentional Infliction of Emotional Distress**

26 To prevail on an intentional infliction of emotional distress (IIED) claim, Magdaluyo
 27 must show: "(1) extreme and outrageous conduct with either the intention of, or reckless
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disregard for, causing emotional distress, (2) [Magdaluyo's] having suffered severe or extreme emotional distress and (3) actual or proximate causation.” *Star v. Rabello*, 625 P.2d 90, 92 (Nev. 1981). “Liability for emotional distress will not extend to ‘mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.’” *Candelore v. Clark Cty. Sanitation Dist.*, 975 F.2d 588, 591 (9th Cir. 1992) (quoting Restatement (Second) of Torts ¶ 46 cmt d. (1965)). The claim is subject to a two-year statute of limitations. Nev. Rev. Stat. ¶ 11.190(4)(c). Thus, the only allegations that may be considered are those that occurred on or after March 12, 2013.

The majority of Magdaluyo's alleged incidents, like those supporting his defamation claim, fall outside the limitations period or are undated. Magdaluyo does not help the court by citing to “Ex. 1-269,” which is the entirety of the hundreds of pages of evidence he has submitted. ECF No. 142 at 40. Magdaluyo offers as specific incidents his confrontation with Willis Monroe, as well as an incident where a supervisor allegedly watched him closely with “an angry stare.” *Id.* at 40–41. Both incidents are captured in videos submitted as evidence. ECF Nos. 240, 248. After reviewing those videos, I conclude neither incident could constitute “extreme or outrageous conduct” by MGM. In the video with the supervisor, he appears to stand and watch Magdaluyo work, similar to another supervisor watching the table behind him. Even if he was making an angry face, this cannot rise to the high standard of IIED. The Nelson incident, as described by Magdaluyo, is perhaps closer to outrageous conduct, but as discussed above, the conduct cannot be imputed to MGM. Magdaluyo fails to create a genuine issue of material fact that would support his IIED claim. I therefore grant MGM's motion for summary judgment on that claim.

F. Remaining Motions

Magdaluyo appeals Magistrate Judge Foley's discovery order (ECF No. 125) that denied his request to compel MGM to produce its written casino surveillance system plan. MGM responds that Magistrate Judge Foley was correct to find the request overbroad and irrelevant, especially where he found that “the only portion of Defendant's policies and procedures regarding surveillance that the Court finds relevant—that dealing with video retention—has

1 already been produced.” ECF No. 125 at 9. Magdaluyo contends that Title VII directs that
2 “employers must adhere to their company policies and failure to do so supports an inference of
3 discrimination.” ECF No. 129 at 5. Because I grant summary judgment on the Title VII claims, I
4 evaluate relevance only to the claim for intrusion upon seclusion. Magistrate Judge Foley’s
5 order is not “clearly erroneous or contrary to law.” Local Rule IB 3-1(a). Magdaluyo’s appeal of
6 that order is denied.

7 Soon after filing his response to MGM’s motion for summary judgment, Magdaluyo filed
8 four documents purporting to object to evidence offered in that motion. Two are styled as
9 “objections” (ECF Nos. 144 and 146) and two as “motions to strike” (ECF Nos. 145 and 147).
10 MGM filed its own motion (ECF No. 155) to strike these four filings as improper attempts to
11 evade the page limits for argument, rather than genuine evidentiary objections. Upon a review of
12 the documents, I agree with MGM. While components of the argument could be cast as quasi-
13 evidentiary objections, the documents primarily disagree with the substance of the claims and
14 evidence in the motion. Magdaluyo has been instructed repeatedly to observe page limits and
15 other procedural requirements, and the court will not sift through the hundreds of pages of filings
16 to identify valid objections.

17 **III. CONCLUSION**

18 IT IS THEREFORE ORDERED that MGM’s motion for summary judgment (**ECF No.**
19 **121**) is **GRANTED in part and DENIED in part** as more fully set forth in this order.

20 IT IS FURTHER ORDERED that Magdaluyo’s appeal of Magistrate Judge Foley’s order
21 on the motion to compel (**ECF No. 127**) is **DENIED**.

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1 IT IS FURTHER ORDERED that the clerk of court shall **STRIKE** Magdaluyo's motions
2 to strike evidence (**ECF Nos. 145 and 147**) and the accompanying objections (**ECF Nos. 144**
3 **and 146**). MGM's motion to strike those motions and objections (**ECF No. 155**) is accordingly
4 **GRANTED**.

5 DATED this 24th day of February, 2017.

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8 ANDREW P. GORDON
9 UNITED STATES DISTRICT JUDGE
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